No. 75-1296

In the

Supreme Court of the United States

OCTOBER TERM, 1975

H. STUART CUNNINGHAM, Clerk, United States District Court For The Northern District Of Illinois,

Petitioner,

vs.

CHICAGO COUNCIL OF LAWYERS, An Association of Lawyers, EDGAR BERNHARD, ELMER GERTZ, CECIL C. BUTLER, WILLARD J. LASSERS, ROBERT PLOTKIN, JOHN H. SCHLEGEL, JOEL J. SPRAYREGEN, SAMUEL K. SKINNER, United States Attorney, JOHN J. TWOMEY, United States Marshal, and TERENCE F. MAC CARTHY, ROBERT S. BAILEY, WILLIAM A. BARNETT, CHARLES A. BELLOWS, EDWARD J. CALIHAN, JR., GEORGE F. CALLAGHAN, GEORGE J. COTSIRILOS, THOMAS D. DECKER, ANTONIO M. GASSAWAY and CORNELIUS E. TOOLE, General Counsel, Legal Office, Chicago Metropolitan Council NAACP,

Respondents.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI AND THE BRIEF IN OPPOSITION TO THE PETITION FILED BY THE RESPONDENT CHICAGO COUNCIL OF LAWYERS, ET AL.

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A reading of the Petition For Writ Of Certiorari To the United States Court Of Appeals For the Seventh Circuit and the Brief For Respondents Chicago Council of Lawyers et al. In Opposition To Petition For Certiorari requires the ten attorneys* who were the interveners in the lower court to respond and clarify their status and position.

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* Terence F. MacCarthy, Robert S. Bailey, William A. Barnett, Charles A. Bellows, Edward J. Calihan, Jr., George F. Callaghan, George J. Cotsirilos, Thomas D. Decker, Antonio M. Gassaway and Cornelius E. Toole; General Council, Legal Office, Chicago Metropolitan Council NAACP.

It is further required that we briefly reiterate our legal position and explain our determination, and comment on the Solicitor General's determination not to seek or support the pending petition for writ of certiorari.

The petitioner, H. Stuart Cunningham, has properly listed us as Respondents. However, our status and position has been and remains somewhat different from that of the other two distinct groups of Respondents. The Chicago Council of Lawyers, An Association of Lawyers, Edgar Bernhard, Elmer Gertz, Cecil C. Butler, Willard J. Lassers, Robert Plotkin, John H. Schlegel and Joel J. Sprayregen, were the plaintiffs in the lower court who argued the unconstitutionality of the district court's no-comment rules. Respondents Samuel K. Skinner, the United States Attorney, and John J. Twomey, the United States Marshal, were named defendants in the lower court. They argued in support of the constitutionality of the no-comment rules. Unfortunately our status, as distinct from that of the other Respondents, is not made sufficiently clear by the Petition or the Brief In Opposition thereto.

After the filing of the complaint in the district court we, representing ourselves as attorneys regularly engaged in the representation of criminally charged defendants in the district court, moved and were granted leave to intervene. Further, we alleged that we do and accordingly should represent the alleged sub-class of those attorneys who regularly represent defendants in criminal cases in the Northern District of Illinois. (Our interests and arguments were and are thus limited to the applicability and propriety of the challenged rules in the context of criminal cases.) Finally, we expressed our support for and request that the no-comment rule (Local Criminal Rule 1.07, United States District Court, Northern District of

Illinois) be preserved, arguing the rule was consistent with and indeed required by *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). We accordingly moved to dismiss the complaint.

We filed extensive briefs in the district court and both briefed and argued the case in the Seventh Circuit Court of Appeals. Briefly summarized, our position was —and most importantly still remains—in support of the no-comment rules as they apply to criminal cases. We believe the rules are necessary if a defendant's right to a fair trial is to be protected against prejudicial publicity. We further argued that most prejudicial publicity, when it occurs, is usually caused by prosecutors or other law enforcement personnel, and that without the benefit of no-comment rules defendants would be left without adequate protection. Parenthetically, all of the suggested alternative remedies intended to offset prejudicial publicity act to a defendant's disadvantage by requiring a waiver of another right: speedy trial where the remedy is delay; a trial in another district where the remedy is a change of venue; and the right to a jury trial where the remedy is a jury waiver.

Desiring, as we do, to maximize the rights of our defendants to a fair trial, we view as not only legitimate but necessary in the short-term and accepted context of pending or imminent criminal litigation, the regulation and limitation of attorney comments.

Mention is made of our not joining in or supporting the Brief For Writ Of Certiorari. (Brief for Respondents Chicago Council of Lawyers, p. 2) This action, or more appropriately inaction, on our part is best understood and appreciated in a reading of Judge Swygert's opinion. *Chicago Council of Lawyers, et al.* v. *Bauer*, 522 F.2d 242 (1975) For the most part the opinion goes to great

pains to distinguish between the relative rights and obligations of prosecutors and defense attorneys. As we read and interpret the opinion, defense attorneys are given great latitude in making out-of-court statements.* Though we did not initially seek these concessions, we certainly and most understandably welcome them and cannot be now heard to ask that these distinctions and concessions be reconsidered.

However, this is not to say the actual results and consequences of the Seventh Circuit's opinion satisfies us. It does not. Notwithstanding Judge Swygert's express belief that ". . . specific rules are necessary. . ." (A 7 and 10) the fact remains there is no requirement that the district court, or for that matter the Judicial Council, adopt new rules. Assuming the district court elects, as we anticipate, not to attempt a redrafting of the no-comment rules, then defendants will be—as they are now—left without the most needed and totally necessary no-comment rules. (Parenthetically, the suggestion in the Chicago Council of Lawyers Brief that the Seventh Circuit ". . . upheld the rules in a number of respects. . ." (Chicago Council of Lawyers Brief, p. 3), should not and cannot be read as suggesting the rules are presently in force. They are not.)

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* Judge Swygert's opinion appears to give judicial approbation to a defense attorney: commenting on criminal charges beyond the mere assertion of innocence (A-8); suggesting the unconstitutionality or the injustice of the charges (A-14); commenting on the particulars of the case (A-14); commenting on the discretion of the prosecutor's office (A-14); taking the case to the public (A-14); soliciting defense funds (A-14); defending the accused's name in public (A-15). Conversely the opinion suggests that most of the no-comment proscriptions should apply to those involved on behalf of the government (A-13).

Candidly stated we, as members of the defense bar, would prefer rules redrafted in accordance with Judge Swygert's opinion, however, we *need* rules which we do not now have. Consistent with the position we have heretofore urged in this case we would gladly accept and can live with the rules declared unconstitutional by the Seventh Circuit Court of Appeals.

Appreciating the observations made in the prior paragraphs, the position of the Solicitor General in not joining in the petition for certiorari may be better understood. We respectfully suggest that the no-comment rules which were held unconstitutional and accordingly void by the Seventh Circuit Court of Appeals, are in practice potential proscriptions against the conduct of prosecutors. If we accept this conclusion it would follow that the Solicitor General would have no great desire to reinstate rules which for the most part sanction the activities of prosecutors.

Respectfully submitted,

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April, 1976